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No. 83-1381

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

WALTER FEINSTEIN, JACK KRIEGSMAN,
LEO MILLER, MORTON H. PASTOR and
JASON I. GREEN,
Petitioners,

vs.

NETTLESHIP CO. OF LOS ANGELES,
PACIFIC INDEMNITY COMPANY,
INSURANCE COMPANY OF NORTH AMERICA,
SENTRY INSURANCE A MUTUAL COMPANY,
AMERICAN RE-INSURANCE COMPANY, and
NORTH AMERICAN REINSURANCE CORPORATION
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

PHILIP F. WESTBROOK*
JOHN W. STAMPER
400 South Hope Street
Los Angeles, California 90071
(213) 669-6000
and
DOUGLAS L. THORPE
10900 Wilshire Boulevard
Los Angeles, California 90024
Attorneys for Respondent Pacific Indemnity Company

ROBERT M. WESTBERG*
PAULINE O. FOX
225 Bush Street
P.O. Box 7880
San Francisco, Calif. 94120
(415) 983-1356
Attorneys for Respondent Insurance Company of North America

* Counsel of Record.

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

JAMES R. MARTIN*
PETER SULLIVAN
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000
Attorneys for Respondent North American Reinsurance Corporation

FREDERICK A. CLARK*
550 South Flower Street
Los Angeles, California 90071
(213) 683-1100
Attorney for Respondent The Nettleship Company of Los Angeles

Of Counsel:
O'MELVENY & MYERS
JOHNSEN, MANFREDI & THORPE
PILLSBURY, MADISON & SUTRO
GIBSON, DUNN & CRUTCHER
OVERTON, LYMAN & PRINCE
MUSICK, PEELER & GARRETT
FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG, MANLEY & CASEY

BRUCE A. BEVAN, JR.*
One Wilshire Boulevard
Los Angeles, California 90017
(213) 629-7777
Attorney for Respondent Sentry Insurance A Mutual Company

JOHN MICHAEL MCCORMICK*
9100 Wilshire Boulevard
Beverly Hills, Calif. 90212
(213) 550-6100
Attorney for Respondent American Re-Insurance Company

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* Counsel of Record.

QUESTION PRESENTED

The question presented by the petition for certiorari distorts the factual bases of the decision below. The actual question presented is narrow. It is:

Did the court of appeals correctly conclude that there was no evidence before the trial court of any agreement to boycott, coerce or intimidate, or act of boycott, coercion or intimidation, within the meaning of § 3(b) of the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U.S.C. § 1013(b), and that the trial court, therefore, properly granted respondents' motions for summary judgment?*

*A list of respondents' subsidiaries and affiliates pursuant to Rule 28.1 is contained in Appendix A hereto.

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RESPONDENTS' BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

Petitioners are doctors, members of the Los Angeles County Medical Association ("the Association"), who elected to purchase medical malpractice insurance in the period 1963-1969 through a group program sponsored by the Association. Their antitrust complaint, filed in 1969, asserted that the program violated the Federal antitrust laws. The district court granted summary judgment dismissing the action on the ground that it was barred by the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U.S.C. §§ 1011-1015 ("the Act"). The court of appeals affirmed. It held that the offering of group medical malprac-

tice insurance to members of a county medical association is the "business of insurance" within the meaning of the Act (Appx. A to Pet., p. A-9). The court of appeals further held that the state-regulation requirement in § 2(b) of the Act is satisfied by California's "extensive regulatory scheme with jurisdiction over all rating practices of insurers, and which grants the insurance commissioner broad investigatory and enforcement powers" (*ibid.*). Finally, the court concluded, from its own examination of the factual record and of the agreement under which the group program was established, that there was no evidence of an agreement to boycott, coerce or intimidate or act of boycott, coercion or intimidation. As the court pointed out,

> "not only were doctors free to purchase insurance elsewhere, whether or not they joined [the Association], but several doctors in this case were covered by other companies at times during the relevant period" (Appx. A to Pet., p. A-10).

No reason exists for this Court to review the judgment. The decisions below turn principally on the lower courts' views of the factual record. There are no conflicting decisions, no novel or important issues of law and no elements of great public interest at stake. In addition, the decisions below are correct. Petitioners, though they were given every opportunity, simply failed to show any act or agreement of boycott, coercion or intimidation[1].

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[1]The McCarran-Ferguson Act limits the application of the Federal antitrust laws "'to the business of insurance to the extent that such business is not regulated by State Law'" (*St. Paul Fire & Marine Ins. Co.* v. *Barry* (1978) 438 U.S. 531, 539). The principal exception to this scheme of pre-emptive state regulation is § 3(b), providing for continued applicability of the Sherman Act to "any

STATEMENT OF THE CASE

Petitioners' statement of the case is inaccurate. The basic facts are set forth in the opinion of the court below (Appx. A to Pet., pp. A-1 to A-4).

Petitioners, at various times in the period 1963 through 1969, chose to purchase their medical malpractice insurance through a program sponsored by the Los Angeles County Medical Association. Respondents are the insurance brokerage firm that acted as underwriting manager for the program (The Nettleship Company of Los Angeles), one of the carriers (Pacific Indemnity Company) and four reinsurers.

It was undisputed that in 1969 when the lawsuit began, most medical malpractice insurance in California was written on a group basis (Appx. A to Pet., p. A-2). Typically, a master policy would be issued to a county medical society and individual certificates to each member physician who chose to be insured under the program. In consideration of a premium paid by the individual insured doctor, the insurer would agree to pay claims arising from his or her negligence in the course of treating patients and also to provide legal representation and services in negotiation and adjustment of claims (Appx. N to Pet., p. A-115).

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agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." A court addressing an application of the Act must ordinarily resolve three issues: (1) Are the activities complained of part of the business of insurance? (2) Are such activities regulated by state law? (3) Is there evidence of any agreement to boycott, coerce or intimidate or of any act of boycott, coercion or intimidation?

Under a written agreement made in 1944, the Association designated Nettleship as the "sole and exclusive agent approved by the association" (CR 781), such designation to continue only as long as the Association desired it (CR 781, 1763, 1766).[3] Nettleship agreed that coverage would not be limited to low risks but that policies would be offered generally to all Association members (CR 1764). The Association, on behalf of its members, was given a voice in such matters as policy forms, choice of counsel to defend claims, expert witnesses, educational and claims prevention activities and adjustment and settlement of claims and suits (CR 1764-1767). Nettleship undertook to provide annual reports to the Association concerning premiums, claims, reserves, estimated profits or losses, etc., pursuant to which rates could be revised to the extent that California law permitted (*id.*, at 1765-1766). Doctors desiring coverage under the particular group program sponsored by the Association had to belong to the Association to be eligible; however, Association members (and others) *at all times remained free to purchase medical malpractice insurance elsewhere if they chose* (Appx. A to Pet., p. A-3).

From 1967 on, Pacific Indemnity was the sole carrier for the program (Appx. N to Pet., p. A-116; Allen Decl., p. 2). Each year, Pacific Indemnity reinsured a portion of the risk by entering into individual reinsurance agreements with other insurance companies (Affidavit of Ralph Smith, filed Sept. 1, 1970, pp. 3, 17) ("Smith Aff."). Each rein-

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[3]For a time, the Association approved another agent, Cass & Johansing, as well; Cass & Johansing offered policies issued by a different carrier under the group program from 1957 until 1967 (Declaration of John C. Allen Submitted Pursuant to Order of March 28, 1980, p. 2 ("Allen Decl.")).

surer agreed for a portion of the net premium to reinsure a portion of Pacific Indemnity's liability (*ibid.*). This is called "quota share reinsurance" and was and is recognized in the industry as a common risk-spreading device (CR 109-110, 216).

Petitioners' complaint alleged that since at least 1951, the respondents had conspired to monopolize and restrain trade in medical malpractice insurance and to fix exorbitantly high premium rates in violation of the Sherman Act (Appx. N to Pet., p. A-117). The complaint alleged that respondents engaged in various acts of boycott, coercion and intimidation (*id.*, pp. A-117 to A-118) and that as a result the petitioners "were compelled to pay substantially higher prices for medical malpractice insurance than would have been the case but for the violation of the antitrust laws" (*id.*, p. A-119). Respondents denied the allegations.

In 1977, the district court granted summary judgment in favor of respondents in reliance upon a Ninth Circuit decision[3] which had limited the scope of the "boycott" exception in § 3(b) of the McCarran-Ferguson Act to activity against insurance companies or agents. Petitioners appealed. While the appeal was pending, this Court overruled *Addrisi* and held that policyholders may also be included in the § 3(b) exception (*St. Paul Fire & Marine Ins. Co.* v. *Barry* (1978) 438 U.S. 531). In light of *Barry*, the Ninth Circuit remanded the instant case to the district court for reconsideration (Pet., p. 7). After further briefing, a *partial* summary judgment was ordered in favor of respondents.[4]

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[3] *Addrisi* v. *Equitable Life Assurance Society of U.S.* (9 Cir. 1974) 503 F.2d 725, *certiorari denied* (1975) 420 U.S. 929.

[4] The partial summary judgment was limited to petitioners' claim that respondents had coerced petitioners into the purchase of other

Petitioners then filed a motion (their fourth) for class certification. The petition (pp. 8-10) quotes *only part* of the hearing transcripts in connection with that motion. At the first hearing, the trial court indicated initially that a class would be certified (despite prior denials); the court deferred ruling on the class issue, however, noting that the factual basis for the allegations of boycott and coercion remained uncertain. The court ordered petitioners to submit a preview of their case-in-chief (Appx. E to Pet., p. A-27), advising them that after this material was assembled, " 'it may very well be that the Court will permit [respondents] to attack the sufficiency of the case you have made, even accepting . . . everything you have proffered . . . to be . . . true' " (Appx. E to Pet., p. A-27). At further hearing on February 2, 1981, the trial court found "that there is just noncompliance by the [petitioners] with the orders of the Court or at least the articulated requirements of the Court" with regard to petitioners' delineation of the evidence (R.T., February 2, 1981, pp. 14, 36). The court accordingly ordered a further particularization of petitioners' evidence (*id.*, p. 48).

The statement of evidence petitioners filed in response to the last order suggested a lack of genuine issues of material fact and respondents again moved for summary judgment. The district court, following thorough briefing and argument, granted the motions (Appx. E to Pet., pp.

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types of insurance as a condition to the offering of medical malpractice insurance. The trial court held that petitioners had failed to point to "any evidence" in support of that claim, and concluded that there was no issue of fact regarding it (Appx. G to Pet., pp. A-60 to A-61).

A-22 to A-55).[5] The Ninth Circuit affirmed (Appx. A to Pet., pp. A-1 to A-14). Petitioners' request for rehearing and for rehearing *en banc* was denied (Appx. A to Pet., p. A-15).

REASONS WHY THE WRIT SHOULD BE DENIED

1. The decision below turns upon an analysis of the particular facts which were proffered to the trial court and raises no important question which should be settled by this Court.

The petition's recital of matters allegedly "established" by the record (Pet., pp. 11-12), is based almost exclusively on prior arguments of petitioners' counsel which were not supported by the evidence. Most misleading is petitioners' erroneous contention that respondents "admitted" that they had unlawfully monopolized trade and commerce in insurance and "admitted" that they had exercised their unlawful monopoly power to exclude competition and unlawfully fix insurance rates in violation of California statute (Pet., p. 5). Respondents did not so admit, and the decisions below do not consider whether such actions would be within the antitrust exemption of the McCarran-Ferguson Act. Thus, the single question which the petition claims to be presented is not even before the Court.[6]

Respondents did concede for the purpose of the summary judgment motions that the trial court could accept as true whatever *evidence* petitioners pointed to bearing on the

[5] After the district court announced that the motions would be granted, but before it issued its opinion, petitioners twice sought mandamus from the Ninth Circuit asking, inter alia, that the district court be ordered to act. Those petitions were denied. Petitioners then sought certiorari in this Court, but withdrew their petition, then sought mandamus in this Court (*In re Feinstein, et al.*, No. 81-2153), which was denied.

[6] Respondents did argue that, absent some agreement or act of boycott, coercion or intimidation, alleged "monopolization" would not destroy the immunity conferred upon the business of insurance

issues raised by the motions. The trial court clearly understood the scope of respondents' *arguendo* concession (see Appx. E to Pet., pp. A-49 to A-50). In granting summary judgment, the trial court repeatedly distinguished between matters asserted by petitioners' counsel and matters as to which there was competent *evidence*. For example:

> "Plaintiffs charge a boycott of doctors practicing 'unaccepted therapies.' But there is *no evidence* of such a boycott * * *.
>
> "Plaintiffs also allege agreements among Defendants and others to divide the insurance market. Plaintiffs claim that one Defendant and another insurance company agreed not to provide the same type of insurance coverage in competition with each other. However, Plaintiffs have not produced *any evidence* of that agreement * * *.
>
> "Plaintiffs further charge that Defendant, Pacific Indemnity, and a Northern California insurance carrier mutually agreed not to compete in each other's markets. Once again, *no evidence* was presented on this issue for the Court's review * * *. [T]here is not sufficient evidence offered to even raise a triable issue of facts as to whether there was an agreement not to compete" (Appx. E to Pet., p. A-31, n. 7, emphasis added).

The court likewise observed:

> "Plaintiffs' counsel state that when [Association] officials waivered in their support of the group plan, the Defendants responded by threatening to drop the

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by the McCarran-Ferguson Act (R.T., November 3, 1981, pp. 14-15). It was not necessary for the lower courts to reach that issue, however, since the record was clear that competing malpractice insurance plans were available to petitioners during the relevant period (see pp. 9-10, infra).

> membership requirement, discontinue financial support and cancel insurance policies issued to Directors of [the Association]. The Further Submission contains *no evidence* to support these allegations * * *" (Appx. E to Pet., p. A-54, emphasis added).

Petitioners nowhere explain how the trial court's view of the facts in this case, or the Ninth Circuit's concurrence with that view, could engender conflicts or confusion with other decisions of other courts. No conflicting decisions are cited. Moreover, the court of appeals applied only established principles of appellate review in considering whether there was any evidence of agreements or acts of boycott, coercion or intimidation.

Contrary to the assertions in the Petition, neither court below held that "an unlawful insurance monopoly was, as a matter of law, entitled to *McCarran-Ferguson Act* exemption" (Pet., pp. 5, 15). As the court of appeals noted, petitioners "focused their ire" (Appx. A to Pet., p. A-6) upon the 1944 agreement between the insurers and the Los Angeles County Medical Association that the Association's group insurance would be offered only to Association members. Petitioners, of course, were Association members. And, as the court of appeals pointed out:

> "Plaintiffs do not contend that the agreement itself forced them to buy the [Association] sponsored insurance from the defendants, or that it prevented them from dealing with other insurers. The only limitation in the agreement, and of which they complain, is the requirement that doctors join [the Association] as a prerequisite to being insured by defendants. Indeed, not only were doctors free to purchase insurance elsewhere, whether or not they joined [the Association], but several doctors in this case were covered by other

companies at times during the relevant period. Because it in no way limited the doctors' ability to deal with third parties, the agreement itself is not an agreement to boycott or coerce the plaintiffs to purchase the defendants' insurance. [Citations.] There is no 'agreement to boycott, coerce or intimidate' within section 1013(b)" (Appx. A to Pet., pp. A-10 to A-11).

The foregoing also makes it unnecessary to consider petitioners' further theory (Pet., pp. 15, 26-27), that the mere existence of monopoly power, even though not effectuated or maintained by acts of boycott, coercion or intimidation, is inherently "coercive," and is therefore automatically within the boycott-coercion exception of the McCarran-Ferguson Act. As it was undisputed in the case at bench that there were competing insurance plans available to petitioners (Appx. E to Pet., p. A-50 (district court opinion); Appx. A to Pet., p. A-10 (court of appeals opinion)), no doctor situated as petitioners could be "coerced" because if he did not like the medical Association's group plan, he was free to buy insurance elsewhere. In view of the facts disclosed in the record, there is simply no reason to reach the question whether or not, as an abstract matter, the existence of an absolute or total monopoly could be characterized as "coercive."

Because petitioners' evidence did not support their arguments that there were acts of boycott or coercion, they were forced to contend "that anything which violates the policies of the Sherman Act is either boycott or coercion" (Appx. E to Pet., pp. 33-34, footnote omitted). The courts below properly rejected that contention. As this Court pointed out in *Barry*:

> "Whatever the precise reach of the terms 'boycott,' 'coercion,' and 'intimidation,' the decisions of this

> Court do not support the dissent's suggestion that they are coextensive with the prohibitions of the Sherman Act" (438 U.S. 531, 545, n. 18).

The suggestion that the lower courts' rulings have an impact beyond this particular case because they "den[y] remedy" to petitioners (Pet., p. 18) and bestow privilege on respondents to act unlawfully, is likewise misdirected. Petitioners chose not to assert any of the remedies provided to them by California's extensive regulatory scheme under which both insurance rates and underwriting rules are subject to review. Petitioners show no reason for Federal antitrust review of matters expressly within the contemplation of the state regulatory scheme.

2. The court of appeals correctly held that petitioners' claims were barred by the McCarran-Ferguson Act. There is no conflict with any other decision.

As the court of appeals correctly concluded, provision of group medical malpractice insurance to members of a medical association is the business of insurance. The Third Circuit has reached the same conclusion (*Owens* v. *Aetna Life & Cas. Co.* (3 Cir. 1981) 654 F.2d 218, 225-226, *certiorari denied* (1981) 454 U.S. 1092). Petitioners offer no contrary authority.

There is no basis for petitioners' erroneous suggestion that the state-regulation requirement in § 2(b) of the McCarran-Ferguson Act is not met unless the state has "sanctioned" or "approved" the challenged conduct (Pet., pp. 21, 23, 26). Petitioners' assertions in this regard are directly contrary to this Court's holding in *F.T.C.* v. *National Casualty Co.* (1958) 357 U.S. 560, 564, a case *not cited* in the Petition. In *National Casualty Co.* the Court held that where a state "has enacted *prohibitory* legislation * * * and

authorizes enforcement through a scheme of administrative supervision * * * the proviso in Section 2(b) [of the McCarran-Ferguson Act] *has been satisfied*" (357 U.S. 564-565, emphasis added; see also *Barry*, supra, 438 U.S. 551-552 and n. 24).

Petitioners' strained assertion (Pet., pp. 26-27) that the decision of the court below "conflicts substantially" with *Barry* on the necessity of state sanction and approval cannot survive examination. In *Barry*, the breadth of § 2(b) was "not in issue" (438 U.S. 540 and n. 9). Moreover, the Court in *Barry*, commenting on the *National Casualty Co.* holding, observed:

> "[T]he Court [in *National Casualty Co.*] *rejected* the Federal Trade Commission's argument that 'where a statute, instead of *sanctioning* a particular type of transaction, prohibits conduct in general terms and provides for enforcement through administrative action, there is realistically, in the absence of such enforcement, no "regulation" in fact' " (438 U.S. 552, n. 24, emphasis added).

California having enacted its own antitrust laws (which petitioners chose not to invoke) as well as laws comprehensively regulating the business of insurance, including rating practices of insurers who act in concert or engage in joint reinsurance, there is simply no basis for petitioners to question the conclusion that California's regulations satisfy the proviso to § 2(b).[7]

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[7]See California Insurance Code §§ 1850-1858.7, 12921, 12926.

Petitioners erroneously contend that *Owens* v. *Aetna Life & Cas. Co.* (3 Cir. 1981) 654 F.2d 218, *certiorari denied* (1981) 454 U.S. 1092, is inconsistent with the ruling below. Far from focusing on petitioners' "sanction" and "approval" theory, *Owens* simply found that the group insurance program in that case was regulated by state law (654 F.2d 222).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP F. WESTBROOK*
JOHN W. STAMPER,
and
DOUGLAS L. THORPE,
Attorneys for Respondent Pacific Indemnity Company.

ROBERT M. WESTBERG*
PAULINE O. FOX,
Attorneys for Respondent Insurance Company of North America.

JAMES R. MARTIN,*
PETER SULLIVAN,
Attorneys for Respondent North American Reinsurance Corporation

FREDERICK A. CLARK,*
Attorney for Respondent The Nettleship Company of Los Angeles.

BRUCE A. BEVAN, JR.,*
Attorney for Respondent Sentry Insurance A Mutual Company.

JOHN MICHAEL MCCORMICK,*
Attorney for Respondent American Re-Insurance Company.

Of Counsel:
O'MELVENY & MYERS,
JOHNSEN, MANFREDI & THORPE,
PILLSBURY, MADISON & SUTRO,
GIBSON, DUNN & CRUTCHER,
OVERTON, LYMAN & PRINCE,
MUSICK, PEELER & GARRETT,
FINLEY, KUMBLE, WAGNER,
HEINE, UNDERBERG, MANLEY & CASEY

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*Counsel of Record

(Appendix A follows)

APPENDIX A

LIST OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

Pursuant to Rule 28.1 of this Court's Rules, respondents provide the following information regarding their parent companies, subsidiaries and affiliates:

Pacific Indemnity Company

Pacific Indemnity Company has no subsidiaries other than wholly-owned subsidiaries and no affiliates. All of the stock of Pacific Indemnity Company is owned by Federal Insurance Company which is in turn a wholly-owned subsidiary of The Chubb Corporation. The following companies are subsidiaries (excluding wholly-owned subsidiaries)or affiliates of Federal Insurance Company or The Chubb Corporation: The Touchette Corp. (New York); La Federacion Compania de Seguros, C.A. (Venezuela); Seguros "Illimani" S.A. (Bolivia); UPA,Inc. (New Jersey); Bolivar Compania de Seguros del Ecuador (Ecuador); Chubb Syndicate Inc. (New York); Frank B. Hall (N.Y. I.E.) Inc. (Delaware); J & H WF Syndicate A (New York); La Federacion Compania de Seguros, S.A. (Colombia); DHC Corp. (Delaware); Argos Companhia de Seguros (Brazil); and Associated Aviation Inc. (New York).

Insurance Company of North America

Insurance Company of North America is a wholly-owned subsidiary of INA Financial Corporation, a wholly-owned subsidiary of INA Corporation which in turn is a wholly-owned subsidiary of CIGNA Corporation. Insurance Company of North America's subsidiaries (except thirty-three (33) wholly-owned subsidiaries) and affiliates (see 26 U.S.C. Sections 1501, 1502, 1504; Treas. Reg. Section 1.1502.1) are: Compagnie d'Assurances Colina S.A. (Ivory Coast); Compagnie Financiere INA (France); Compagnie Nouvelle d'Assurances (France); INA International Investors, Ltd. (Pennsylvania); La Nouvelle, S.A. (France); Paine Webber Incorporated (Delaware) and its seventy-four (74) subsidiaries and affiliates; and Societe Civile Immobiliere Turina (France).

In addition to the foregoing, the parent companies of Insurance Company of North America have varying ownership interests in over three hundred and seventy-six (376) other insurance, insurance-related, health care, real estate, and investment companies, both domestic and foreign, including Connecticut General Corporation and its subsidiaries and affiliates. Should the Court desire listings of these companies, and of the subsidiaries and affiliates of Paine Webber Incorporated, Insurance Company of North America will supplement its listing.

The Nettleship Company of Los Angeles

The Nettleship Company of Los Angeles was acquired by the Frank B. Hall Co. in 1973 and as part of that transaction was dissolved.

Sentry Insurance A Mutual Company

Sentry Insurance A Mutual Company has no subsidiaries (except wholly-owned) and no affiliates. The current respondent was formerly Sentry Insurance and Hardware Mutual Casualty Company.

North American Reinsurance Corporation

North American Reinsurance Corporation is owned by Swissre Holding (N.A.) Inc., New York, New York, which is owned by Swissre Holding Ltd., Zurich, which is owned by Swiss Reinsurance Corporation, Zurich. North American Reinsurance Corporation has no subsidiaries. Affiliated companies are: F & D Holding Corp. (Delaware); Fidelity & Deposit Company (Maryland); Fidelity & Deposit Company of Maryland (Maryland); NARe Life Mgmt. Co. Inc. (New York); North American Reassurance Company (New York); SR Geothermal Inc. (Delaware); Swiss-Am Reassurance Company; Swiss Reinsurance Co. (N.A.) Inc. (New York); Swissre Advisers, Inc. (New York); Swissre Corp. (New York); Swissre Life Insurance Company; Swissre Management Corporation; "Switzerland" General Ins. Co. Ltd. of Zurich (Switzerland); Switzerland Gen. Ins. Corp. of New York (New York); and Tudor Insurance Co. (New Hampshire).

American Re-Insurance Company

American Re-Insurance Company is a wholly-owned subsidiary of Aetna Life and Casualty, a Connecticut corporation. The following companies are subsidiaries of American Re-Insurance Company: American Excess Insurance Company (Delaware); A. M. Re Brokers, Inc. (Delaware); Am. Re. Managers of Texas, Inc. (Texas); and American Independent Reinsurance Company (Delaware).